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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NO._____

MAJOR BECTON, STANLEY BECTON, ROBERT JONES, ROBERT POLLACK, VINCENT DAMION and BARRY MIROJNICK,
Petitioners

v.

THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

THE SOLE ISSUE PRESENTED BY THIS CAUSE IS JURISDICTIONAL:

WHETHER UNDER THIS COURT'S DECISIONS IN *BURKS v. UNITED STATES* AND *ABNEY V. UNITED STATES*, A CRIMINAL DEFENDANT MAY TAKE AN INTERLOCUTORY APPEAL OF A DOUBLE JEOPARDY CLAIM, WHERE, IN SPITE OF THE FACT THE EVIDENCE ADDUCED AT TRIAL AGAINST HIM WAS INSUFFICIENT AS A MATTER OF LAW, THE TRIAL COURT DENIED HIS MOTION FOR JUDGMENT OF ACQUITTAL AND THE JURY WAS UNABLE TO REACH A VERDICT?

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NO. _____

MAJOR BECTON, STANLEY BECTON, ROBERT JONES, ROBERT POLLACK, VINCENT DAMION and BARRY MIROJNICK,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Major Becton, Stanley Becton, Robert Jones, Robert Pollack, Vincent Damion and Barry Mirojnick, the Petitioners herein, pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this cause on December 18, 1980.

OPINION BELOW

The opinion of the Court of Appeals is reported at 632 F.2d 1294 and is printed as Appendix "A" hereto.

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was entered on December 18, 1980. A timely Petition for Rehearing *en banc* was denied April 27, 1981 (a member of that Court having requested a poll for reconsideration *en banc*), the issuance of the mandate having been stayed on May 13, 1981, pending application for review by this Court, and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 22 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment (Double Jeopardy Clause):

> . . . Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . .

Federal Rules of Criminal Procedure, Rule 29(a):

> . . . The court on motion of a defendant or on its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction for such offense or offenses.

STATEMENT OF THE CASE

These six Petitioners were tried on a three count indictment[1] for conspiracy to import [21 U.S.C. § 960], con-

1. Appellant Stanley Becton was not indicted on Count 2 (conspiracy to possess with intent to distribute marijuana).

spiracy to possess [21 U.S.C. § 869] and possession with intent to distribute marijuana [21 U.S.C. § 841]. The cause was tried to a jury and at the close of the Government's case all Defendants moved for judgment of acquittal pursuant to Rule 29(a), F.R.Cr.P., on the ground that the Government had adduced insufficient evidence to support a conviction as to any of the three counts. The trial court granted a judgment of acquittal as to Count 1 (conspiracy to import), but denied same as to Counts 2 and 3 (conspiracy to possess and possession with intent to distribute).

After approximately "16 hours of deliberation, three notes indicating the jury believed itself unable to reach a verdict, and an *Allen* charge from the Court, a mistrial was declared by the trial court *sua sponte*".[2] Petitioners' several renewed motions for judgments of acquittal were overruled [Vol. 5, p. 88, l. 11-25; pp. 105, l. 21; p. 106, l. 15; p. 115, l. 5-9 and 15].

Upon being put to retrial, Petitioners timely filed a Motion to Dismiss for Prior Jeopardy on the ground that the trial court's denial of Petitioners' Motions for Judgment of Acquittal was erroneous in that the evidence was legally insufficient to support a finding of guilty as to the remaining Counts 2 (conspiracy to possess) and 3 (possession with intent to distribute) with respect to each of the Defendants.

An interlocutory appeal to the Court of Appeals was dismissed in an opinion holding that petitioners must await exposure to a second trial and conviction, if any, to review the sufficiency of evidence adduced by the

2. The jury foreman reported the last vote was 8 to 4 for acquittal on the conspiracy count [Vol. 5, p. 112, l. 10-12] and 11 to 1 for conviction on the possession count [Vol. 5, p. 112, l. 13-14].

Government in the first trial which ended when the jury was unable to reach a verdict. *U.S. v. Becton* (5th Cir. 1980) 632 F.2d 1294, 1394. In dismissing the appeal below the Fifth Circuit stated:

> "It should be borne in mind that we do not confront the issue of reviewability; it is not an open question in this circuit that precisely this issue [sufficiency of evidence at the first trial] is subject to review on appeal from a second conviction, should one occur. *United States v. Wilkinson*, 601 F.2d 791 (5th Cir. 1979)." *U.S. v. Becton, supra*, p. 1296.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN *BURKS V. UNITED STATES* AND *ABNEY V. UNITED STATES* AS WELL AS THE DECISIONS OF OTHER COURTS OF APPEALS.

The straightforward teaching of *Abney v. U.S.*, 431 U.S. 651 (1977) and *Burks v. U.S.*, 437 U.S. 1 (1978), is that the Constitution guarantees that no person may be twice put to trial where legally insufficient evidence is offered at the initial proceedings. In *Burks* this Court specifically held that the government may not put a defendant to trial a second time where an Appellate Court has ruled that the evidence was legally deficient in the first trial. And in *Abney* the Court mandated the establishment of procedures for permitting interlocutory appellate review of double jeopardy claims, in order that an accused will not be "forced to endure a trial that the Double Jeopardy Clause was designed to prohibit," pp. 794-5.

Had Petitioners' Motions for Judgment of Acquittal been granted in the first place the Double Jeopardy Clause would have precluded retrial of any defendant on any count.

And had the Petitioners been convicted and the Appeals Court reversed on sufficiency grounds the Double Jeopardy Clause would likewise bar retrial. *Burks v. U.S.*, 437 U.S. 1 (1978).

In fact the Court below held that on double jeopardy grounds[3] the sufficiency of evidence may be reviewed on appeal even though a mistrial was declared after the "jury failed to reach a unanimous verdict". *U.S. v. Becton, supra,* p. 1296. It requires however, that Petitioners must await exposure to a second trial and conviction, if any, to process that appeal, p. 1296. See also: *U.S. v. Rey* (5th Cir. 1981) 641 F.2d 222, pp. 225-6.

What the Court below holds Petitioners cannot achieve by interlocutory appeal, it admits can be accomplished on appeal after a second trial.

> "It should be borne in mind that we do not confront the issue of reviewability; it is not an open question in this circuit that precisely this issue is subject to review on appeal from a second conviction, should one occur." *U.S. v. Becton, supra,* p. 1296.

At least one other Circuit appears to be in accord with this anomalous result, suggesting a defendant "will be free to raise the double jeopardy issue on appeal, in the event that the [subsequent] trial results in conviction".

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3. The Fifth Circuit relied upon *U.S. v. Wilkinson* (5th Cir. 1979) 601 F.2d 791 which was premised exclusively upon the double jeopardy clause, p. 794.

U.S. v. Ellis (4th Cir. 1981) 646 F.2d 132, pp. 135-6, Murnaghan, J., concurring.[4]

However, *Abney v. U.S., supra,* unequivocally established the right of the defendant to have his double jeopardy challenge reviewed by the Appellate Court "*before* a subsequent exposure to (retrial) occurs", p. 662.

Put another way, if the Double Jeopardy Clause entitles a defendant to appeal the sufficiency of evidence in a trial resulting in a hung jury on appeal from a subsequent conviction, then same should be reviewable by interlocutory appeal on Double Jeopardy grounds under *Abney*.

PURPOSES OF "DOUBLE JEOPARDY CLAUSE" UNDERMINED BY REQUIRING RETRIAL BEFORE APPELLATE REVIEW OF "SUFFICIENCY" IN THE FIRST TRIAL

One of the underlying purposes of the Double Jeopardy Clause is to prevent the prosecution from taking a second bite at the apple solely to supply evidence it failed to produce at the first proceeding. In *Burks v. U.S.*, 437 U.S. 1 (1978) this Court noted that "[T]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceedings". *Burks v. U.S., supra,* p. 11; *U.S. v. Wilkinson, supra,* p. 794;

4. Judge Murnaghan there suggests:
"I doubt that we should or would decline to rule on the double jeopardy question, and in the interests of preserving formality at the expense of substance, require the defendant to go through the ordeal of another trial, well knowing that any conviction would, on appeal, be reversed." *U.S. v. Ellis, supra,* p. 136.

Hudson v. Louisiana, ____ U.S. ____, 101 S.Ct. 970 and n.5 (February 24, 1981). And that is precisely what the government has already stated it intends to do if Petitioners are retried: offer additional evidence and testimony against these defendants [Vol. 5, p. 95, l. 10-12 and p. 96, l. 17-21].

Where the Government "has been given one fair opportunity to offer whatever proof it could assemble" and their "case was so lacking that it should not have even been *submitted* to the jury" then it would appear "the purpose of the [Double Jeopardy] Clause would be negated were we to afford the Government an opportunity for the proverbial 'second bite at the apple' ". *Burks v. U.S., supra*, pp. 15-16.

The other reason most often advanced for the Double Jeopardy Clause it that it precludes much more than double punishment; it "is a guarantee against being twice put to trial for the same offense" forcing the defendant "to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense", *Abney v. U.S.* 431 U.S. 651, p. 661 (1978); *Dunberly v. Hogan* (2nd Cir. 1978) 579 F.2d 141.

> "The underlying idea . . . is that the state . . . should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Abney v. U.S., supra*, pp. 661-2; *Green v. U.S.*, 355 U.S. 184, pp. 187-8 (1957).

The Supreme Court in *Abney* went on to hold that to require an accused to be retried and to "run the gauntlet"

a second time before an appeal could be taken would undermine these very aspects of the guarantee's protection. *Abney v. U.S., supra,* p. 662.

ABNEY AND *COHEN* REQUIREMENTS FOR INTERLOCUTORY APPEAL MET

The Court below suggests that the sufficiency issue does not meet one of the requirements for interlocutory review set out in *Abney* and *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949) in that it is "in no sense collateral to the merits, but . . . precisely directed to them". *U.S. v. Becton, supra,* p. 1297.

However, in *Abney* this Court actually held that under *Cohen* the order sought to be appealed need only be "collateral to, and separable from, the principle issue at the accused's *impending* trial". (emphasis supplied) *Abney v. U.S., supra,* p. 659; *U.S. v. McDonald,* 435 U.S. 850, p. 859 (1978).

Here, the Government has stated it intends to offer substantially different and more extensive evidence at Petitioners' "impending" trial, than it had at their first trial. Petitioners' appeal on *Burks* grounds focused on the Government's authority to compel that second impending trial. That appeal sought to review, not the likely merits of the *second* trial, but the Constitutional sufficiency of the *first* trial's evidence. Such review concerns issues collateral to and separable from the merits of the upcoming second trial. See: Alexander, *Interlocutory Appellate Review of Double Jeopardy Claim:* A Method for Testing Evidentiary Sufficiency After a Non-Final Criminal Proceeding, Texas Bar Journal (January 1981), 11, p. 14.

Moreover, it does not appear that this Court in *Abney* was suggesting that the particular double jeopardy claim there presented was one subject to interlocutory review under *Cohen,* but that *all* double jeopardy claims by their "very nature" are collateral to and separable from the central issue of guilt in the "impending" trial.

> "Although it is true that a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds lacks the finality traditionally considered indispensable to appellate review, we conclude that such orders fall within the 'small class of cases' that *Cohen* has placed beyond the confines of the final - judgment rule . . . the very nature of a double jeopardy claim is such that it is collateral to, and separable from the principle issue at the accused's impending criminal trial." *Abney v. U.S., supra,* p. 659.

NO REQUIREMENT OF PRIOR COURT DETERMINATION OF INSUFFICIENCY

The fact that "there has been no determination [evidentiary] insufficiency by any court", *U.S. v. Becton, supra,* p. 1295, has not precluded two circuit courts of appeals from allowing interlocutory appeal of the sufficiency of evidence after reversal and remand on other grounds. *U.S. v. United States Gypsum Co.* (3rd Cir. 1979) 600 F.2d 414; *U.S. v. Jelsma* (10th Cir. 1980) 630 F.2d 778.

> "The Appellants . . . appeal from the denial of their . . . motion for judgments of acquittal on the ground of insufficiency. . . . If the defendants are correct that the evidence tendered at the first trial was insufficient to support a conviction, retrial would sub-

> ject them to double jeopardy. . . . Consequently, they may appeal the denial of their motion at this juncture, under the 'collateral order' exception to the final judgment rule." *U.S. v. United States Gypsum Co., supra,* p. 416.

The defendants in *U.S. v. Gypsum* and *Jelsma* had one more determination of the evidence's sufficiency [the jury's] than did the Petitioners in the instant case, with no intervening appellate determination to the contrary.

There is no logical reason why Petitioners should be any worse off because this jury hung than if the jury had improperly convicted.

FEAR OF APPEALS FROM RULE 29 MOTIONS UNWARRANTED

The Court below also suggested that if sufficiency of evidence was reviewable by interlocutory appeal prior to a second trial, then it might likewise be "reviewable . . . by giving notice of appeal when the motion [for judgment of acquittal] was first denied, at the close of the government's case". *U.S. v. Becton, supra,* at p. 1296.

However, the double jeopardy clause does not entitle a Petitioner to review every sufficiency determination or denial of motion for judgment of acquittal. Instead, it precludes "exposure" to a subsequent trial and therefore arises only upon a motion to dismiss, when and if the government seeks to retry a defendant. Had the government not sought to reprosecute petitioners and require them to again "run the gauntlet", they would not be seeking this review.

2. POLICY REASONS OF JUDICIAL ECONOMY AND PRESERVATION OF THE INDIVIDUAL'S CONSTITUTIONAL RIGHTS WARRANT REVIEW.

JUDICIAL ECONOMY

The result of the opinion below is to require two trials with the attendant costs in judicial time and expense of empanelling two juries and requiring the attendance of witnesses and the taking of testimony not once but twice. Furthermore, the Appellate Court will still be required to review two records on appeal should the second trial result in a conviction. There is no savings; and there exists under this procedure the potential for an unnecessary jury trial in the event the subsequent appeal reveals the evidence at the first was insufficient.

INDIVIDUAL'S CONSTITUTIONAL RIGHTS

More importantly, the resulting procedure requires appellants "to endure a trial the Double Jeopardy Clause was designed to prohibit". *Abney v. U.S., supra,* p. 662. If on appeal of the second trial it is determined that the evidence was insufficient at the first trial, then regardless of the relief from any consequence of that subsequent conviction, the Petitioners have been required to suffer the very harm the Double Jeopardy Clause was designed to prohibit; being twice put on trial for the same offense.

3. THE ISSUE AS HERE PRESENTED IS RIPE FOR REVIEW.

Unlike the situations presented in *Hanigan v. U.S.,* No. 80-1650 (March 9, 1981) where the issue had been

rendered moot because the Petitioners there had already been put to retrial [See: Brief of Solicitor General p. 3], or in *Kuhn v. U.S.*, No. 80-1715, cert. den. 49 L.W. 3906, where a prior withdrawn Court of Appeals opinion had already determined the petitioners' first trial was sufficient to support a conviction [See: 629 F.2d 1087-1088], in the instant cause the Court of Appeals has stayed any retrial pending application for review by this Honorable Court and has expressly refused to ". . . consider at this time the sufficiency of the evidence at the first trial". *U.S. v. Becton, supra,* p. 1297. The issue here is ripe for consideration.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been mailed to the United States Attorney for the Southern District of Texas and the Solicitor General, Washington, D.C., on this the 26th day of June, 1981.

GERALD H. GOLDSTEIN

APPENDIX "A"

UNITED STATES of America,
Plaintiff-Appellee,

v.

Major BECTON, Stanley Becton, Robert Jones, Robert Pollack, Vincent Damien and Barry Mirojnick,
Defendants-Appellants.

No. 80-1630

UNITED STATES COURT OF APPEALS
Fifth Circuit

Dec. 18, 1980

Defendants, whose trial on drug charges resulted in hung jury and consequent declaration of mistrial took interlocutory appeal from denial by the United States District Court for the Southern District of Texas, at Galveston, Hugh Gibson, J., of motions for acquittal and to dismiss on grounds of former jeopardy. The Court of Appeals, Gee, Circuit Judge, held that Court of Appeals lacked jurisdiction to consider interlocutory appeal which, though in form asserting former jeopardy, in fact raised only denial of motion to acquit.

Appeal dismissed.

Appeal from the United States District Court for the Southern District of Texas.

Before THORNBERRY, GEE and REAVLEY, Circuit Judges.

GEE, Circuit Judge:

This expedited appeal presents two issues, a jurisdictional one of broad interest and importance, and an evidentiary one of interest to the appellants only. Since the need for us to consider the latter depends on how we resolve the former, we discuss it first.

Appellants' trial on drug charges resulted in a thoroughly[1] hung jury and the consequent declaration of a mistrial. Motions for judgment of acquittal at the close of the prosecution's case, renewed after the jury's discharge, were partly granted but in main denied. When the remaining counts were set for retrial, appellants renewed their motions for acquittal and further moved to dismiss on grounds of former jeopardy, asserting that the evidence produced against them at their prior trial had been insufficient to warrant submission of the case to the jury. It is the denial of these motions that they bring to us.

Appellants' argument—and an appealing one it is—runs that had they been convicted, and had their conviction been reversed on appeal for insufficiency of supporting evidence, they could not have been again put to trial. This is correct. *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978). How then, they assert, can it be that where, as here, the evidence was so entirely insufficient as to produce a hung jury rather than a conviction, a retrial is yet permissible? When the prosecution's case is on, and the evidence is insufficient, why should a defendant be worse off if the jury hangs than if it improperly convicts? Stated as an abstract proposition, the argument by analogy seems unanswerable.

---

1. To the degree of an *Allen* charge and three notes attesting to its deadlock.

There are important differences between the case presented here, however, and the proposition stated; and the two apparent parallels are not really parallel at all. In the case posed of a reversed conviction, we contemplate a final decision, entered in the course of appellate review, that the prosecution has had its chance to make a case for the jury and has failed to do so. *Burks,* cited above, stands for the proposition that after such a determination by the appellate judges, the Fifth Amendment forbids a second trial, regardless of whether the defendant sought one, just as it would have had the trial judge made the same determination, refused to submit the case to the jury, and therefore necessarily entered judgment of acquittal.

[1] Here there has been no such determination of insufficiency by any court, trial or appellate. Instead we contemplate a contrary determination by the first trial court—that the evidence *was* sufficient to warrant submission to the jury—and a mere refusal by the jury to convict. Such a refusal is an action in no wise the necessary equivalent of a decision, even by the jury, that the evidence is insufficient to warrant submission. In the first place, of course, the jury is neither equipped nor asked to make such a determination. In the second, it is a commonplace that juries can refuse to convict even on substantial evidence of guilt, while to the contrary judges are not to acquit unless the government has clearly failed to produce evidence supporting a conviction when viewed most favorably to the prosecution. *Burks, supra* at 16-17, 98 S.Ct. at 2149-2150. What the appellants seek instead, is a determination by us now—on this interlocutory appeal before their retrial—that the evidence at the first trial was insufficient to warrant sub-

mission and that the trial judge erred in denying their motions for acquittal. This is new ground.

The procedural vehicle which brings this appeal before us is *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). There the Court decided that inferior appellate courts possess jurisdiction under the rubric of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), to entertain appeals from pretrial orders denying dismissal on double-jeopardy grounds. The nub of the decision is that the Double Jeopardy Clause forbids a second *trial*, not merely a second conviction. In addition, however, the Court held that another claim for dismissal made in the same motion was not reviewable, one urging insufficiency of the indictment. In so holding, the Court laid it down generally that, to be appealable under the *Cohen* rubric, claims for dismissal other than on double jeopardy grounds must themselves meet the requirements of the *Cohen* exception. Bearing the lessons of *Burks* and *Abney* in mind, we turn again to our case.

Although in form the question presented here is that of denial of a motion asserting former jeopardy, in reality and substance the appellants seek review of their motions to acquit made at the first trial. They argue that these should have been granted, since the evidence there was insufficient to support a jury submission, and that had they not been erroneously denied, no succeeding trial would have been permissible. Thus, we contemplate just such a "thinly disguised attempt to turn this [*Abney*] appeal into a plenary review of his first trial" as the Second Circuit rebuffed in *United States v. Klein*, 582 F.2d 186 (1978). We conclude we must do likewise.

[2] It should be borne in mind that we do not confront the issue of reviewability; it is not an open question in this circuit that precisely this issue is subject to review on appeal from a second conviction, should one occur. *United States v. Wilkinson*, 601 F.2d 791 (5th Cir. 1979). Instead the issue is one of appealability: whether we have jurisdiction under *Cohen* and *Abney* to review at this time the decision denying the motions for acquittal at the first mistrial.[2] And if it is presently reviewable under *Cohen*, we see no apparent reason why it would not have been likewise reviewable under *Cohen* by the giving of notice of appeal when the motion was first denied, at the close of the prosecution's case in the first trial, thus halting the trial process—in the absence (perhaps) of a finding of frivolousness. See *United States v. Dunbar*, 611 F.2d 985 (5th Cir. 1980) (en banc). Moreover, if it is possible to take an interlocutory appeal by means of making a double-jeopardy claim grounded on any trial error or errors which it can be asserted should have resulted in an acquittal at the first trial—erroneous admission of a great body of severely damaging evidence, for example—we view the prospect of piece-meal appeals with a vengeance. We do not believe that *Cohen* and *Abney* require such a result. At all events, we do not believe that we should press those decisions to such lengths unless they ineluctably demand it.[3]

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2. No complaint is made of the declaration of a mistrial. Nor could one well be made, the jury having been hopelessly hung and the *Perez* standard of "manifest necessity" therefore satisfield. *United States v. Perez*, 22 U.S. 579, 580, 9 Wheat. 579, 580, 6 L.Ed. 165 (1824).

3. We recognize that *Wilkinson, supra*, opines in dicta that the decision is interlocutorily appealable. 601 F.2d 791, at 795. That panel did not confront the issue as we do, however, and was not called on to struggle with it as we have. We are not bound by dicta,

[3] Among the *Cohen* factors, reiterated in *Abney*, is the requirement that the decision sought to be appealed "was not simply a 'step toward final disposition of the merits of the case [which would] be merged in final judgment,'" *Abney v. United States*, 431 U.S. 651, 658, 97 S.Ct. 2034, 2039, 52 L.Ed.2d 651 (1977), quoting *Cohen, supra* 337 U.S. at 546, 69 S.Ct. at 1225. A motion for judgment of acquittal is no more than a motion for directed verdict. Such motions are in no sense collateral to the merits, but are precisely directed to them. They are in fact just such steps toward their final disposition as the Court concluded did not justify a *Cohen* appeal in its language quoted above. In short, though the other *Cohen* factors are arguably present here, that discussed above is not. *Cohen* is a narrow exception, applicable to a "small class" of claims which meet all, not merely some, of its factors. 337 U.S. 541, at 546, 69 S.Ct. at 1225. The class which we contemplate here is not a small one. Rather, it comprises all criminal trials in which a motion to acquit for insufficiency of evidence is made and denied. One of *Cohen's* factors is not present here. We therefore lack jurisdiction to consider this appeal which, though in form asserting former jeopardy, in fact raises only the denial of the motion to acquit.

In view of our disposition of this issue, we need not consider at this time the sufficiency of the evidence at the first trial. The appeal is

DISMISSED.

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even of our own court. *Bruce v. Estelle*, 536 F.2d 1051, 1059 n.5 (5th Cir. 1976), *cert. denied*, 429 U.S. 1053, 97 S.Ct. 767, 50 L.Ed.2d 770 (1977). And though we accord it the greatest deference and persuasive force, mature consideration has convinced us that we should not follow it here. Dicta of the Supreme Court are, of course, another matter.